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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

Nos. 200-201

PIERRE S. Du PONT, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JOHN J. RASKOB, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit, entered in the above entitled causes on March 6, 1941 and made final when petitions for rehearing were denied on March 31, 1941.

Opinions Below

The opinions of the Board of Tax Appeals (6 R. 1-103[1]) are reported in 37 B. T. A. 1198 and 1283. The opinion of the Circuit Court of Appeals (6 R. 251-259) is reported in 118 F. (2) 544.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered March 6, 1941 (6 R. 259-260). Petitions for rehearing were filed by both Petitioners on March 19, 1941[2] (6 R. 260, 262). These petitions were denied March 31, 1941 (6 R. 268). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the taxpayers sustained deductible losses on sales of securities to each other on November 13, 1929.

2. Whether the taxpayers sustained deductible losses on sales of securities to each other on December 26, 1929.

3. Whether petitioner, Raskob, realized taxable profits on the disposition of part of the securities purchased from Du Pont on November 13, 1929 (including the question of Raskob's cost basis for such securities).

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[1] The records in the two cases have been printed together as a single record. It consists of six volumes. The numerals preceding the letter "R" indicate the volume number.

[2] Rule 35 of the Rules of the Third Circuit Court of Appeals provides that a petition for rehearing must be filed within fifteen days after the entry of judgment. In these cases the petitions for rehearing were filed thirteen days after the entry of the judgments.

Statutes Involved

Revenue Act of 1928, c. 852, 45 Stat. 791:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft.

* * * * *

(h) *Loss on sale of stock or securities.*—For disallowance of loss deduction in the case of sales of stock or securities where within thirty days before or after the date of the sale the taxpayer has acquired substantially identical property, see section 118.

SEC. 118. LOSS ON SALE OF STOCK OR SECURITIES.

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23 (e) (2) of this title; nor shall such deduction be allowed under section 23 (f) unless the claim is made by a corporation, a dealer in stocks or

securities, and with respect to a transaction made in the ordinary course of its business. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed."

Statement

The facts, as found by the Board of Tax Appeals (6 R. 4-45), may be summarized as follows:[3]

In 1929 Du Pont realized large profits on the sale of securities (4 R. 267). In October 1929 the stock market crashed (6 R. 4). Du Pont actively aided in efforts made to prevent complete demoralization (3 R. 872, 875). To this end he expended about $20,000,000 purchasing stocks and taking up accounts (6 R. 5). In November 1929 Du Pont held a large amount of securities which showed losses (6 R. 6, 42). He was desirous of offsetting his losses against his previously realized profits (6 R. 6).

Du Pont and Raskob were close friends and had been intimately associated together in business and social life for many years (6 R. 4). On November 12, 1929 Du Pont told Raskob he wanted to sell securities to realize his losses but he did not wish to sell large quantities of stock in a market just recovering from a panicky condition which he was and was known to be supporting. Raskob told Du Pont that he also had securities to sell to establish losses and that he would take Du Pont's stock provided he could sell a somewhat similar amount (6 R. 6).

On November 13, 1929 Du Pont sold to Raskob blocks of five different stocks for $4,582,750 and Raskob sold to Du Pont blocks of seven different stocks for $4,606,000 (6 R. 6, 7). All the securities were listed on exchanges

[3] For purposes of clarity, references are made to a few minor details not included in the Board's findings but about which there is no question.

and the prices were within the market of the day (6 R. 7, 8). The parties gave each other checks for the purchase prices. The checks were deposited together at a bank where both had accounts. (6 R. 9.) The stock certificates were delivered to each other and were transferred into their respective names, stock transfer taxes being duly paid (6 R. 10, 41). The transactions were regularly entered on the books of account of the taxpayers as sales and purchases of stock (6 R. 10).

Included in the stocks bought by Raskob from Du Pont were 56,500 shares of General Motors. In 1929 Raskob sold part of this stock to a corporation owned by his wife and he used the balance to cover a short sale previously made through a broker. These transactions showed a profit of $201,256.40. Raskob reported this profit in his return for 1929. No adjustment has been made with respect to this profit and Raskob has been taxed thereon. Du Pont knew nothing of these transactions until 1937. (6 R. 13, 14.)

On December 26, 1929 Du Pont told Raskob that he wished to sell 40,000 shares of Warner Brothers stock but did not wish to dump such a large block on the Exchange at that time (6 R. 21; 3 R. 666-668, 715, 900). Raskob said he would be glad to buy the stock but that he would have to sell some securities to raise funds for the purchase. He offered Du Pont 5,000 shares of Baltimore & Ohio and 14,000 shares of Anaconda Copper and Du Pont agreed to purchase them. (6 R. 21.)

Du Pont sold the Warner stock for $1,560,000 and Raskob sold the B. & O. and Anaconda for $1,569,000 (6 R. 21, 22). These prices were based on the stock market prices of the day (6 R. 23). The parties gave each other checks for the purchase prices. The checks were mailed together to the bank. (6 R. 23.) The stock certificates were delivered to each other and were transferred into their respective names, stock transfer taxes being duly paid (6 R. 23, 41; 4 R. 199, 225). The transactions were regularly entered on the books of account of the taxpayers as sales and purchases of stock (6 R. 24).

On January 3, 1930 Raskob deposited with a bank, as collateral security for a loan to him, the Warner stock which he bought from Du Pont on December 26, 1929. This stock remained with the bank as security for Raskob's loan until June 13, 1930. Du Pont was unaware of this use of the securities.[4] (6 R. 19, 25.)

After the stock market crash in October 1929 Du Pont rendered financial assistance and gave advice to various persons in distress (6 R. 30-32). These people held substantial amounts of Warner stock (6 R. 31, 32). Du Pont told these people he was holding his Warner stock[5] (6 R. 32).

On January 3, 1930 Du Pont and Raskob discussed with each other the resale of the securities bought from each other on November 13, 1929 (6 R. 14, 15), including the 100,000 shares of Warner bought by Du Pont from Raskob (6 R. 7) which was substantially all the Warner stock Du Pont then held (6 R. 32).[6]

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[4] It will be noted that Raskob sold to and pledged with others almost 60% in value of the stocks which he bought from Du Pont, all without the latter's knowledge or consent (6 R. 6, 13, 14, 19, 21, 25).

[5] On November 13, 1929 Du Pont bought 100,000 shares of Warner from Raskob (6 R. 7). Before that date he had acquired 40,000 shares, which he sold to Raskob on December 26, 1929 (6 R. 21) so that at the beginning of 1930 Du Pont held 100,000 shares (6 R. 32).

[6] According to the testimony of Du Pont and Raskob, Du Pont was willing to sell the 100,000 shares of Warner and the other stocks purchased from Raskob on November 13, 1929, but was concerned over the fact that if he did so he would hold no Warner stock. The people whom he was assisting and who were relying on him held a substantial amount of the stock. He had talked with all of these people, knew approximately their holdings in Warner stock and had told them that he was holding his stock. His concern was that if now he should sell out all of his personal holdings, he was in a way going back on them, and if thereafter the market price should drop, he would be embarrassed by having protected himself

On January 3, 1930 arrangements were made for a short sale of Warner stock by Du Pont to Raskob of 25,000 to 30,000 shares, the exact amount to be determined later (6 R. 33). Raskob executed a 6% demand note, dated January 3, 1930, payable to Du Pont, with the amount blank, and left it with his secretary with instructions to fill in the amount, computed at the rate of $40 per share, the then market value, upon being informed by Du Pont's secretary of the number of shares Du Pont would sell. On January 6, 1930 Du Pont's secretary advised that the transaction would be for 27,000 shares,[7] the note was filled in accordingly and was delivered (6 R. 33), together with a letter from Raskob confirming the transaction (6 R. 34). The transaction was regularly entered on Du Pont's books as a short sale (6 R. 34).[8]

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without having protected them. (3 R. 715, 724, 904, 905, 945-947, 1066.) Du Pont did not know the exact amount of Warner holdings of those whom he was helping and those who were relying on him, but he estimated it to be somewhere approaching 30,000 shares, probably 25,000 or 26,000 shares. (3 R. 716, 905, 1066, 1067.) Accordingly, it was agreed that Raskob would purchase 25,000 to 30,000 shares in addition to the 100,000 shares, the amount in excess of 100,000 shares to be sold "short" by Du Pont and to cover the stock held by others whom he was assisting and who were relying on him. (3 R. 715, 716, 904, 905.) Du Pont's thought was that if the market price of the Warner stock should go down, he would offer to those whom he was assisting the opportunity to participate in the short sale, and if the market price should go up, it would be in connection with a general advance in the market and he would profit so greatly on other securities which he held that he could well afford the loss on the short sale. (3 R. 1065-1067.)

[7] Du Pont testified the number of shares was made up of 20,000 shares held by corporations owned by relatives, 4,350 shares held in brokerage accounts of a departmental official of the Du Pont Company and accounts guaranteed by him, and approximately 2,000 shares held by three friends (3 R. 724, 725, 819-830). He testified he may or may not have included 1,000 shares held in a thrift account maintained by him for his employees (3 R. 725).

[8] And was similarly entered on Raskob's records (4 R. 143, 145, 157).

Also on January 6, 1930, Du Pont and Raskob each sold to the other, at their then market values, the same amounts of securities bought from each other on November 13, 1929 (6 R. 15-18). The selling price of the securities sold by Raskob was $5,254,125 and the selling price of the securities sold by Du Pont was $5,989,500 (6 R. 16). At Raskob's request, Du Pont consented to accept Raskob's 6% demand note for $700,000 in part payment of the purchase price of the stocks bought by Raskob, and Raskob delivered to Du Pont his check for $5,289,000 in payment of the balance. Du Pont delivered to Raskob a check for $5,254,125 to cover the stocks bought from Raskob, and the two checks were sent to the bank together (6 R. 18, 19). The stock certificates were delivered to each other and were transferred into their respective names (6 R. 18, 19). Du Pont delivered to Raskob the stock certificates reissued in Du Pont's name for the stock certificates received from Raskob on the purchases of November 13, 1929 and Raskob did likewise as to the 87,400 shares purchased from Du Pont (6 R. 6) except as to 56,500 of those shares (6 R. 39, 20). Stock transfer taxes were duly paid (6 R. 41), and the transactions were regularly entered on the books of account of the taxpayers (6 R. 20).

On January 13, 1930 Raskob went to Florida (6 R. 25). Before leaving he signed two checks payable to the order of Du Pont with the dates and amounts blank. At the same time he wrote two letters to Du Pont, one confirming the sale of 40,000 shares of Warner and the other confirming the purchase of 14,000 shares of Anaconda and 5,000 shares of B. & O. (the amounts of these stocks involved in the transactions of December 26, 1929). The purchase and sale prices in the letters were left blank. Raskob and his secretary, Garey, alone had knowledge of the writing of these letters and checks. (6 R. 25, 26.)

After January 3, 1930 the market price of Warner stock rose steadily (6 R. 35). This meant paper loss to Du Pont

and paper profit to Raskob with respect to the 27,000 shares sold short by Du Pont to Raskob on January 3, 1930 (6 R. 80).

On Saturday morning, January 25, 1930, Raskob had a long-distance telephone conversation with Du Pont in Wilmington respecting the closing of the short sale transaction. Nothing was said during the conversation about the price for the stock (6 R. 35). On Monday morning, January 27, 1930, Raskob called his secretary, Garey, in Wilmington on long-distance, told Garey that Du Pont had agreed on January 25th to cover his short transaction in Warner, entered into on January 3, 1930, by purchasing 27,000 shares from Raskob, and that the price would be $50 per share, the price current at the time of Raskob's telephone conversation with Du Pont on January 25th (6 R. 35, 38). Raskob requested Garey to consummate the transaction on such terms (6 R. 35).

Raskob also told Garey to see Du Pont about purchasing the Warner stock sold to him by Raskob on December 26, 1929 (6 R. 26). According to the finding of the Board (6 R. 26):

> "He (Raskob) also said that it *might be possible* Du Pont would want to sell the Anaconda Copper Mining Co. and the Baltimore & Ohio Railroad Co. stocks sold by Raskob to Du Pont on December 26, and, *if so*, he was willing to buy it, and that *in case the sales were made*, to go ahead and use the checks and letters (previously prepared) * * *. He also stated that *if* Du Pont bought both blocks of Warner Brothers Pictures, Inc. stock (referring to the 40,000 shares sold December 26 and the 27,000 shares involved in the short sale transaction) he wanted to pay off his notes. He told Garey to buy and sell at current market prices as he might agree with Du Pont (as to stock sold December 26)." (Italics ours)

After his telephone conversation with Raskob, Garey went in to see Du Pont and told him about his telephone

conversation with Raskob and of the price fixed for covering the short sale of 27,000 shares of Warner (6 R. 35). Garey also took up with Du Pont the matter of purchase by Du Pont of 40,000 shares of Warner and the sale by him of 14,000 shares of Anaconda and 5,000 shares of B. & O., and Du Pont agreed to purchase and sell these securities at their then market prices (6 R. 26-29).

Garey thereupon inserted the selling prices and otherwise completed the letters confirming the sale by Raskob to Du Pont of 40,000 shares of Warner and the purchase by Raskob from Du Pont of 14,000 shares of Anaconda and 5,000 shares of B. & O., being the letters Raskob had left behind when he went to Florida (6 R. 26). Garey delivered the completed letters, certificates for the stock, and a check for transfer taxes to Du Pont (6 R. 26, 30, 41). Du Pont likewise wrote letters to Raskob confirming the transactions and delivered to Garey, acting for Raskob, certificates for the Anaconda and B. & O., and a check to cover stock transfer taxes (6 R. 28, 30, 41). The stock certificates for Anaconda and B. & O. delivered by Du Pont were the certificates reissued in his name for the certificates received from Raskob on the purchases of December 26, 1929 (6 R. 39). The stock certificates for 40,000 shares of Warner delivered by Raskob were part of the 100,000 shares reissued to Raskob for certificates received from Du Pont on the purchases of January 6, 1930 (6 R. 39, 30).

On January 27, 1930 Du Pont delivered to Garey a check to the order of Raskob for $2,020,000 in payment of the 40,000 shares of Warner. On the same day Garey inserted the date "January 27, 1930" and the amount of $1,600,000 in one of the two checks which had been signed by Raskob before he went to Florida and delivered the completed check in payment of the Anaconda and B. & O. Du Pont's bank balance was less than the difference between the two checks and, in order to meet his check to Raskob, Du Pont drew a check for $300,000 on another bank. The three checks were sent to the bank together. (6 R. 29, 30.)

The purchases and sales of January 27, 1930 were regularly entered on the books of Du Pont and Raskob (6 R. 30). The difference ($420,000) between the price of the 40,000 shares of Warner sold by Raskob and the price of the Anaconda and B. & O. purchased by him, plus the proceeds of the 27,000 shares of Warner ($1,350,000), was almost sufficient to pay off Raskob's two notes to Du Pont for $700,000 and $1,080,000 (6 R. 80). The principal of the notes, plus interest, amounted to $1,787,066.66 (6 R. 36). On January 27, 1930 Garey inserted the date "January 27, 1930" and the amount $1,787,066.66 in the second check drawn to the order of Du Pont by Raskob before he went to Florida and delivered the completed check to Du Pont in payment of the principal of and interest to January 27, 1930 on the notes. The notes were thereupon delivered to Garey (6 R. 36, 37). On January 30, 1930 Du Pont's check to Raskob for $1,350,000, the purchase price of the 27,000 shares of Warner (covering the short sale), was delivered to Garey (6 R. 37), and this check and Raskob's check for $1,787,066.66 in payment of his notes and interest were sent to the bank on January 30, 1930.

With respect to the sales made in January 1930, in his income tax return for 1930 Du Pont reported profits of $1,144,500 and Raskob reported profits of $1,138,943.80 (6 R. 43, 44). Because of the realization of losses in 1930 after January, Raskob paid no Federal income tax for that year (6 R. 44; 2 R. 252; 4 R. 205). Du Pont realized substantial losses in 1930 subsequent to January, but his Federal income tax return for that year as originally filed showed tax due of $8,180.85, which was paid (6 R. 44; 4 R. 277). In December 1932 the Commissioner proposed to determine an overassessment of the total tax paid by Du Pont for 1930, but in January 1934 he determined instead that there was a deficiency of $13,000.03, resulting from adjustments not related to the matters in question (6 R. 44). Although the statute of limitations on assess-

ment of such additional tax had run (5 R. 815) Du Pont consented to the assessment and paid the deficiency (6 R. 44).

Except where otherwise indicated, the Board has found the facts to be as stated above. The only important respect in which the taxpayers take exception to the Board's findings (other than its conclusions[9]) is as to the reason for the short sale of 27,000 shares of Warner, found by the Board to have been made by Du Pont on January 3, 1930. The Commissioner contended this transaction never occurred (6 R. 76) and on this assumption he asserted the claim in question (1 R. 47, 222). Du Pont testified the transaction was entered into by him as a hedge and for the purpose of affording a means of protecting people who were relying on him from the consequences of a falling market in Warner stock, as more fully stated in footnote 6, pages 6, 7. The Board found all of the important facts to be as represented by the taxpayers (6 R. 30-38), but then inferred the parties entered into the transaction on January 3, 1930, not for the purpose testified to by Du Pont, but for the purpose of balancing their accounts in cash at the end of the month (6 R. 73-84).

In other words, the Board concluded that when the parties on January 3rd agreed on their first repurchases (6 R. 14, 15) they ascertained they were then apart in cash about $735,000[1]; that they had agreed to repurchase at the end of January the Warner, Anaconda and B. & O. stocks sold to each other on December 26, 1929; that they wanted to be all even in cash when those repurchases were made; that they foresaw how Warner, Anaconda and B. & O. probably would fluctuate in price during the month of January; and that they then determined a short sale by Du Pont of 27,000

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[9] Findings 53 (6 R. 30) and 75 (6 R. 45).

[1] The difference between the repurchase prices of $5,254,125 and $5,989,500 (6 R. 16).

shares,—not 25,000 or 30,000 but the odd figure of 27,000 shares,—of Warner at the then current market price, covered at a market price around the end of the month, would probably balance them out when the various transactions all were closed at the end of January.

And the parties were supposed to have made this calculation at a time when the stock market was, and for several months had been, going through the wildest days of its history, when prices were fluctuating in a manner never before thought possible, and conditions were such that it is very safe to say no one knew what was going to happen next.

We submit the Board's conclusion is insupportable.

The Circuit Court concluded it was unnecessary to decide what the reason was for the short sale transaction.[2] The decision of the Circuit Court is that the losses were not allowable irrespective of the short sale transaction and, therefore, irrespective of the alleged balancing in cash. This was the Commissioner's primary contention before the Circuit Court (although, as noted, it was not his contention when he initiated his claim [1 R. 47, 222]).

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1) In holding that the sales of securities by the taxpayers to each other on November 13, 1929 were not such as to result in deductible losses.

2) In holding that the sales of securities by the taxpayers to each other on December 26, 1929 were not such as to result in deductible losses.

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[2] Referring to the short sale and the balancing in cash the Circuit Court said:

> "This may have been a coincidence or the real purpose may have been the protection of friends and employees who had been speculating in stock sold short" (6 R. 257).

3) In failing to hold that Du Pont realized deductible losses on his sales to Raskob on November 13, 1929 and December 26, 1929 as allowed by the Commissioner before he filed his Second Amended Answer in the Du Pont case (1 R. 29).

4) In failing to hold that Raskob realized deductible losses on his sales to Du Pont on November 13, 1929 and December 26, 1929 as allowed by the Commissioner before he filed his Amended Answer in the Raskob case (1 R. 156).

5) In holding that Raskob realized taxable profits of $201,256.40 with respect to the disposition by him in 1929 of 56,500 shares of General Motors acquired from Du Pont on November 13, 1929.

6) In holding that Raskob's basis for said 56,500 shares of General Motors was the amount paid therefor by him to Du Pont.

Reasons for Granting the Writs

The Circuit Court decided these transactions did not result in "losses" within the meaning of Sec. 23 (e) (2). The Court did not decide the transactions came within Sec. 118.[3] It concluded that under Sec. 23 (e) (2), the sales did not result in losses because there was not a sufficient severance of the property from the seller. The Court found there was a "'co-existent intention'" to "repurchase" (6 R. 254), that since the parties were "sympathetic" (6 R. 255), they could assume they would be able to repurchase, and that such circumstances divested the trans-

[3] The Court said: "Congress has not seen fit to sever our particular skein. It has attempted no delimitation of good faith here." (6 R. 254.)

actions of an "incident of finality" (6 R. 253) necessary to a deductible loss.[4]

1. The interpretation of Sec. 23 (e) (2) by the Circuit Court in this case is in conflict with the interpretation of the Fifth Circuit in *United States* v. *Spalding,* 115 F. (2) 54. In the *Spalding* case a son sold land to his father in 1933. The father gave his son the right to occupy the land in consideration of paying the taxes and keeping the improvements in repair (so that the son did not part with possession). He also gave his son the option to repurchase the land at approximately the same price. The option expired upon the death of the father in a subsequent year. The Court held the son realized a deductible loss in the year of sale and not in the year the option to repurchase expired.

The *Spalding* case goes even further than this case. There the seller retained possession and legally enforceable rights to repurchase. Here the Circuit Court found no such situation. The most that can be said here is that there was such an understanding between the parties and their relationship was such as to give the seller reasonable assurance of being able to repurchase. But he had no legally enforceable rights to that end and could only hope the purchaser would resell,—a hope which might be frustrated by intervening death or bankruptcy of the purchaser, a change of mind, or what not.

The fact that in this case there was a repurchase, whereas in the *Spalding* case there was not, is immaterial. Since under the income tax law each year stands alone, the question is the degree of severance *in the taxable year* sufficient to result in deductible loss. As noted, during the taxable year there was less severance in the *Spalding*

[4] Although there was as much "finality," in a realistic sense, as in the case of the ordinary year-end tax loss sale on a stock exchange where the seller intends to and does repurchase after thirty days.

case than there was in the instant case. If the Fifth Circuit had held in the *Spalding* case the loss was realized when the option expired, the decision would have been consistent with the Third Circuit's decision here. The Fifth Circuit not having so held the cases are in conflict.

2. For like reasons the decision of the Third Circuit in this case is in conflict with the decision of the Ninth Circuit in *Commissioner* v. *Peterman,* 118 F. (2) 973. In that case real estate was sold in 1936 for non-payment of taxes. Under the local law the taxpayer had a right of redemption until some time in 1937. The Court held the loss was realized in 1936, when the property was sold, and not in 1937, when the right of redemption expired, despite the fact that until such later time there was not a complete severance of right to ownership and possession. That is, the Court held a parting with the property less complete during the taxable year than that here resulted in a deductible loss.

3. The decision here is inconsistent with the decision of affirmance by an equally divided court in *Helvering* v. *Johnson,* 308 U. S. 523, affirming (C. C. A. 8) 104 F. (2) 140. In that case the taxpayer wanted to establish a tax loss on stock. He formed a corporation, borrowed $100,000 from a bank, transferred $49,900 to his wife, $200 to a friend and kept the balance. The three paid $100,000 for the stock of the corporation, the friend endorsed his certificate to the taxpayer, and on the same day the corporation purchased the stock from the taxpayer for $240,000. The purchase price was paid $99,000 in cash and $141,000 in a note collateralized by the stock. The taxpayer paid off his bank loan with the $99,000. With the exception of the purchase of a small amount of bonds, the corporation did no business except with respect to the acquisition of this stock. The corporation's note was collateralized by the

stock so that the taxpayer retained possession. He exercised complete control over the corporation and voted the stock sold as proxy. The Board found he would not have sold the stock to a member of the public, that his intention was to continue to hold the stock, and that he had no intention of selling the stock to his wife. The Circuit Court allowed the loss. This Court affirmed by an equally divided bench. We submit this decision is clearly inconsistent and in conflict with the present case.

Such conflict and inconsistency as exist between the decision below, on the one hand, and the decisions of other Circuits and this Court in the *Spalding, Peterman* and *Johnson* cases, *supra,* on the other hand, have been recognized by this Court as grounds for granting a writ. Cf. the "alleged" and "asserted conflict" between *Griffiths* v. *Commissioner,* 308 U. S. 355 and *Higgins* v. *Smith,* 308 U. S. 473; the "asserted inconsistency" with prior decisions of the Supreme Court, considered justifying certiorari in *Deputy* v. *Du Pont,* 308 U. S. 488; the "substantial" conflict relied on in *Neuberger* v. *Commissioner,* 311 U. S. 83 and *R. F. C.* v. *Prudence Group,* 311 U. S. 579; the conflicts "in principle" cited in *Harrison* v. *Schaffner,* 61 Sup. Ct. 759, *Higgins* v. *Commissioner,* 312 U. S. 212, and *Helvering* v. *Horst,* 311 U. S. 112; the "probable conflict with the principles underlying" other decisions, mentioned in *Pearson* v. *McGraw,* 308 U. S. 313, and *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331; the "probable conflict" referred to in *United States* v. *U. S. F. & G. Co.,* 309 U. S. 506, and *Helvering* v. *Leonard,* 309 U. S. 644; the "inconsistency of decisions" grounding certiorari in *Helvering* v. *Bruun,* 309 U. S. 461; the "differing interpretations" of a statutory phrase, relied on in *City Bank*

Farmers Trust Co., Trustee (Duke) v. *Helvering*, 61 Sup. Ct. 896, and *United States* v. *Pyne*, 61 Sup. Ct. 893; and similar reasons cited in *Helvering* v. *F. & R. Lazarus Co.*, 308 U. S. 252, *Helvering* v. *Price*, 309 U. S. 409, and *Anderson* v. *Helvering*, 310 U. S. 404.

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4. The Circuit Court found that the law involved here has not been clarified by "any very satisfactory judicial" interpretation (6 R. 252). The question frequently arises and the Circuit Court found that the decisions are in "chaos" (6 R. 254).

It is submitted under such circumstances there is appropriate occasion and urgent reason for the Supreme Court to consider the matter and to endeavor to bring some order out of the chaos.

5. It has been noted that during the taxable year, with respect to the disposition of 56,500 shares of General Motors acquired from Du Pont, Raskob, on the basis of the purchase price from Du Pont, realized profits of $201,256.40 (6 R. 13, 14). The Circuit Court held Raskob was taxable on this amount of profits (6 R. 258). In other words, the Court held that Raskob had a cost for the stock of the amount paid therefor to Du Pont, although the Court simultaneously held that the sale by Du Pont did not result in a loss to him.

This raises a question which was left open by the decision of this Court in *Higgins* v. *Smith*, 308 U. S. 473. There the Court held that a sale to a wholly owned corporation did not sufficiently sever the property from the taxpayer to permit him to take a loss. If so, what is the basis to the acquiring entity? Does the amount of basis equal to the difference between cost and selling price evaporate, or does the acquiring entity take the same basis as the transferor, to whom no loss was allowed?

It is believed that, in the interest of satisfactory administration of the tax law, the uncertainty on this point, created by this Court's decision in *Higgins* v. *Smith, supra,* should be dispelled. Since the present proceeding involves this question, it is submitted for this reason also the Supreme Court should review the case.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

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